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# In the Supreme Court of the United States

OCTOBER TERM, 1974

**No. 74-1284**

JOHN S. EDMUNDS,

*Petitioner,*

vs.

ROBERT WON BAE CHANG
JUDGE, FIRST CIRCUIT COURT
STATE OF HAWAII

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF FOR RESPONDENT IN OPPOSITION

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## BRIEF FOR RESPONDENT IN OPPOSITION

## OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (Appendix pp. 1a–7a of Petition) is reported at 509 F. 2d 39. The opinion of the District Court (Appendix pp. 8a–25a of Petition) is reported at 365 F. Supp. 941.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTION PRESENTED

Whether the imposition of a fine as a sentence for criminal contempt, without an additional or alternative sentence of confinement, is sufficient to constitute "custody" within the meaning of the federal habeas corpus statutes, 28 U.S.C. §§ 2241 and 2254.

## STATUTES INVOLVED

This case involves the interpretation of the custody requirement of 28 U.S.C. §§ 2241 and 2254.

## STATEMENT OF THE CASE[1]

On January 23, 1973, Petitioner, an attorney, was representing a defendant in a state criminal trial[2] in which the Respondent was judge. After the bailiff had opened court, and as the court was about to begin the process of calling the case, noting the presence of defendants, counsel, jury, etc.; but before the calling of the case by the clerk or any word by the court,the colloquy between Petitioner and Respondent occurred as reported in the Petition (pp. 3-4).

Later on the day of the twenty-third, Petitioner was served with an order holding him in criminal contempt and directing him to pay a fine of twenty-five dollars within forty-eight hours. The judgment contained no additional or alternative sentence to confinement or any other punishment. Before the expiration of that time, Petitioner moved Respondent to reconsider his judgment. No action was taken on that motion. On January 29, 1973, Petitioner was ordered to appear before Respondent four days later to show cause why he should not be held in further contempt for failure to comply with the original contempt order. Petitioner then sought a writ of prohibition from the Hawaii Supreme Court.[3] That court restrained Respondent from pro-

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[1] The statement of the case is taken substantially from the opinions below.

[2] *State of Hawaii vs. James Pokini, et al.*, Cr. No. 44262 (Circuit Court of the First Circuit, State of Hawaii).

[3] There is no direct appellate review of criminal contempt sentences under the Hawaii state court procedure. See Hawaii Penal Code, § 1077(5). (Appendix, infra p. 17).

ceeding further while it considered the writ. When the Hawaii Supreme Court denied the writ[4] Petitioner applied to the United States District Court for the District of Hawaii for a writ of habeas corpus to review the lawfulness of the contempt. The district court issued a restraining order against Respondent and ultimately issued the writ. Respondent appealed to the United States Court of Appeals for the Ninth Circuit which reversed the district court on the jurisdictional question which is presented here for review:

> The primary question on this appeal is whether a person against whom a fine has been imposed by a state court is 'in custody' within the meaning of the federal habeas corpus statute, 28 U.S.C. §§ 2241, 2254. The district court, concluding that he is, proceeded to the merits of petitioner Edmunds' claim and granted a writ. 365 F. Supp. 941 (D. Hawaii 1973). We disagree on the jurisdictional question and, accordingly, reverse. Appendix, pp. 1a-2a of the Petition.
>
> . . . we conclude that there is insufficient 'custody' present for the invocation of habeas corpus relief; the claimed restraints on Edmunds' liberty are neither severe nor immediate enough to justify the remedy. Appendix, p. 3a of the Petition.
>
> We trust that whatever Congress meant by the word 'custody' when it enacted the habeas corpus statute, it did not intend to authorize federal intervention into state judicial proceedings to review a 'fine only' sentence. The custody requirement exists to distinguish between 'severe restraints on individual liberty' and those which are not severe. If the latter category does indeed exist, we are clear that a 'fine only' sentence falls within it. (Footnotes omitted) Appendix p. 6a of the Petition.

Execution of the state court judgment has been restrained by a series of orders from the various courts involved, the last order being a stay of mandate issued by the Court below on March 4, 1975.

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[4]The 3-2 decision of the Hawaii Supreme Court denying the writ of prohibition is reported at 54 Hawaii Rep. _____, 512 P. 2d. 3 (1973). There is no question that petitioner has exhausted his state remedies *as to the $25 fine.*

## REASONS FOR DENYING THE WRIT

### I. There Is No Conflict Between the Decision Below and Applicable Decisions of This Court on the Scope of Federal Habeas Corpus Relief

As Petitioner correctly points out, 28 U.S.C. § 2254(a) provides that the writ of habeas corpus is available to:

> . . . a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

The various grounds on which the writ may otherwise be granted are stated in 28 U.S.C. § 2241, and the ground specified in § 2254(a) is the ground initially stated in 28 U.S.C. § 2241(c) (3):

> § 2241 Power to grant writ
>
> - - - -
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> - - - -
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States;

The phrasing of 28 U.S.C. § 2241(c) (3), which is repeated in 28 U.S.C. § 2254(a), has two factors inherent in it: the nature of the governmental illegality alleged (i.e. the violation), and the type of restraint to which a petitioner has been subjected (i.e. the custody).[5] The petition here before this Court does not concern itself with the "violation" factor. The court below did not reach that issue. Therefore, and contrary to Petitioner's implication (Petition, p. 2), the question before this Court is not a Constitutional one, but one of statutory interpretation, namely: the narrow issue of the scope of the "custody" requirement of the aforementioned habeas corpus statute. Of this requirement this Court recently stated in *Hensley vs. Municipal Court*, 411 U.S. 345 (1973):

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[5] See generally, *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1040 (1970).

> The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate. *Id.* at 351.

In *Jones vs. Cunningham*, 371 U.S. 236 (1963) this Court first recognized that severe restraints could be legal rather than physical.

> While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in . . . 'custody' . . . within the meaning of the habeas corpus statute. *Id.* at 243.

Jones as a parolee was subject to four types of restraint. He was restricted in his lawful physical movement. He was restricted in other matters which required the approval or supervision of his parole officer. He was threatened with reincarceration for the duration of his original sentence for even the slightest violation of the regulations. Lastly, he could be ordered back to prison for violations of parole regulations without a judicial hearing. [*Id.* at 242] [See also *Humphrey vs. Cady*, 405 U.S. 504 (1972)] An extension made by this Court since *Jones* has been founded on similar restraints, but no case cited by Petitioner or decided by this Court extends *Jones* to the confines of this case.

With *Jones* as a point of departure, Petitioner cites five decisions[6] of this Court as authority that the decision below is a retreat from this Court's expanded interpretation of the Great Writ. Respondent cannot agree that a retreat has been made for the simple reason that this Court has never occupied the ground prayed for by Petitioner.

In *Peyton, Carafas,* and *Braden, supra,* the restraint was the traditional one of imprisonment. These decisions did not rule on the na-

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[6] *Peyton vs. Rowe*, 391 U.S. 54 (1968); *Carafas vs. LaVallee*, 391 U.S. 234 (1968); *Strait vs. Laird*, 406 U.S. 341 (1972); *Braden vs. Kentucky*, 410 U.S. 484 (1973); *Hensley vs. Municipal Court*, 411 U.S. 345 (1973). [Petition, p. 8].

ture of the restraint, for there was no question that it was imprisonment and imprisonment is the ancient impetus for the existence of the writ.[7] [9 W. Holdsworth, *A History of English Law* 108-25 (1938)]. What they did rule on was peripheral matters surrounding the restraint of imprisonment.

*Peyton* found on both historical and policy grounds that the prematurity rule as stated in *McNally vs. Hill* 293 U.S. 131 (1934) was ill-founded.[8] In *McNally*, this Court determined that a prisoner serving the first of two consecutive sentences could not attack the second on habeas corpus. [*Walden vs. Wainwright*, 390 U.S. 335, 336 (1968)]. Without abandoning the doctrine entirely, *Peyton* nevertheless greatly limited the situations seen as premature. *Peyton* stands not so much for an expanded interpretation of the Great Writ, as for a removal of a modern restriction.

In *Carafas*, this Court stated:

> The issue presented, then, is whether the expiration of petitioner's sentence, before his application was finally adjudicated and while it was awaiting appellate review, terminates federal jurisdiction with respect to the application. [391 U.S. at 237]
>
> - - - -
>
> . . . we conclude that under the statutory scheme, once the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to the completion of proceedings of such application. [*Id.* at 238]

It was not a question of the nature of the restraint that faced the Court, but rather a question of whether jurisdiction, having once attached, through the restraint of imprisonment, could be defeated by the termination of the restraint.

Likewise is *Braden* not in conflict with the decision below. In *Braden*, the petitioner was imprisoned in Alabama.

> He applied to the District Court for the Western District of Kentucky for a writ of federal habeas corpus, alleging denial of his

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[7] It was the application of the Habeas Corpus ad subjiciendum et recipiendum to the case of persons committed to prison by the Council, which suggested the use of the writ for the protection of the liberty of the subject. *Id.* at 111.

[8] *Developments in the Law, supra*, note 5, pp. 1087-1093.

constitutional right to a speedy trial . . . and praying that an order issue directing respondent to afford him an immediate trial on a then three-year old Kentucky indictment. [This Court is] to consider whether, as petitioner was not physically present within the territorial limits of the District Court for the Western District of Kentucky, the provision of 28 U.S.C. § 2241(a) that '[w]rit of habeas corpus may be granted by the . . . district court . . . *within their respective jurisdictions*' [Court's emphasis], precluded the District Court from entertaining petitioner's application. 410 U.S. at 485–486.

This Court's conclusion was that:

> The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody. [*Id.* at 494–495]
>
> - - - -
>
> Read literally, the language of § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction' requiring that the prisoner be brought before the court for a hearing on his claim or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction. [*Id.* at 495]

This Court went on to state that the prisoner's warden in Alabama acted as the agent for Kentucky in holding the prisoner subject to Kentucky's detainer.

Respondent would agree that the remaining two decisions by this court[9] cited by Petitioner may be extensions of *Jones* and apposite to the decision below, but finds them neither in conflict with the decision below nor approaching the parameters of Petitioner's case. In *Jones, supra,* petitioner had been imprisoned, was out on parole, and was subject to restrictions of physical movement, supervision by a parole officer, threat of reincarceration for the slightest violation of parole regulations, and imprisonment for violation of parole regu-

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[9] *Hensley vs. Municipal Court,* 411 U.S. 345 (1973); and *Strait vs. Laird,* 406 U.S. 341 (1972).

lations without a judicial hearing. *Hensley* was almost the same case, except on the other side of the term of imprisonment. In *Hensley*, the petitioner had been sentenced to a year in jail (and fined $625), but without having begun to serve his sentence, he was released on his own recognizance and was granted an order staying execution of his sentence. The California Penal Code provided the following restrictions as stated by this Court:

> (a) He will appear at all times and places as ordered by the court or magistrate releasing him and as ordered by any court in which, or any magistrate before whom, the charge is subsequently pending.
>
> (b) If he fails to so appear and is apprehended outside of the State of California, he waives extradition.
>
> (c) Any court or magistrate of competent jurisdiction may revoke the order of release and either return him to custody or require that he give bail or other assurance of his appearance . . . . Cal Penal Code § 1318.4.
>
> A defendant is subject to re-arrest if he fails to appear as agreed, id., § 1318.8(a), and a willful failure to appear is itself a criminal offense. Id., § 1319.6. We assume that these statutory conditions have been imposed on petitioner at all times since the state trial court stayed execution of his sentence. [411 U.S. at 348.]

This Court first found the restraints similar to those in *Jones* and no less severe than those imposed on the petitioner in *Strait vs. Laird, supra.* [411 U.S. at 352] Then:

> Second, petitioner remains at large only by the grace of a stay entered first by the state trial court and then extended by two Justices of this Court. The State has emphatically indicated its determination to put him behind bars, and the State has taken every possible step to secure that result. His incarceration is not, in other words, a speculative possibility that depends on a number of contingencies over which he has no control. This is not a case where the unfolding of events may render the entire controversy academic. The petitioner has been forced to fend off the state authorities by means of a stay, and those authorities retain the determination and the power to seize him as soon as the obstacle of the stay is

removed. The need to keep the stay in force is itself an unusual and substantial impairment of his liberty.

Moreover, our conclusion that the petitioner is presently in custody does not interfere with any significant interest of the State. Indeed, even if we were to accept respondent's argument that petitioner is not in custody, that result would do no more than postpone this habeas corpus action until petitioner had begun service of his sentence. It would still remain open to the District Court to order petitioner's release pending consideration of his habeas corpus claim. Even if petitioner remained in jail only long enough to have his petition filed in the District Court, his release by order of the District Court would not jeopardize his 'custody' for purposes of a habeas corpus action. Plainly, we would badly serve the purposes and the history of the writ to hold that under these circumstances the petitioner's failure to spend even 10 minutes in jail is enough to deprive the District Court of power to hear his constitutional claim. (Citations and footnotes omitted.) *Id.* at 352-353.

As the court below recognized:

The sole punishment confronting Edmunds is a $25 fine; there is no provision in the sentence for his confinement in the case of non-payment. True enough, a threat of incarceration is implicit in any court-imposed fine, for jail is one of the sanctions by which courts enforce their judgments and orders. Hence a fine may in some circumstances ultimately prove to be the price of freedom. But until confinement is imminent—as it was in *Hensley* where only a stay held off execution of the petitioner's one-year jail sentence—the 'special urgency' justifying use of the habeas remedy is notably absent.

In this regard, we reject the district court's conclusion that the threat of confinement raised by a pending contempt proceeding based on Edmunds' failure to pay the fine supplies the requisite 'custody'; should the stay presently in force be lifted, the resultant hearing could have any number of possible outcomes, only one of which is incarceration. At this juncture, confinement is no more than a speculative possibility—'the unfolding of events may render the entire controversy academic.' *Hensley, supra,* at 352.

> Neither do we agree that the possibility of disciplinary action against Edmunds provides the requisite 'restraint on liberty.' No showing has been made that such a proceeding is pending or even contemplated. Moreover, in view of the nature of the record upon which the conviction of contempt is based, the imposition of professional discipline appears most unlikely.
>
> Nor do we agree that the existence of the contempt judgment amounts to a severe restraint on Edmunds' liberty because it injures his 'delicate balance of [his] harmony with the courts.' 365 F. Supp. at 944. He has made no showing of either of these supposed effects of the judgment, and such incidental professional disability as we may presume exists under the circumstances is insufficient to provide the requisite restraint. (Footnotes omitted) (Appendix of Petition, pp. 3a–5a)

*Strait vs. Laird, supra,* was decided under 28 U.S.C. § 2241(c) (1) and not (c) (3).

> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof.

*Strait* did not involve state custody, but, as to the custody requirement, may be akin to *Hensley* if active duty in the armed services is correlative to imprisonment. In *Strait,* this Court said:

> We held in *Schlanger* [*vs. Seamens,* 401 U.S. 487 (1971)] that, while an active-duty serviceman in such a status might be in military 'custody,' see *Donigan vs. Laird,* 308 F. Supp. 449 (Md. 1969), his custodian may not be deemed present .... 406 U.S.C. at 344.

See also *Hammond vs. Lenfest,* 398 F. 2d 705 (2d Cir. 1968). As in *Hensley,* the petitioner in *Strait* was on the verge of "imprisonment" and the custodian had taken all steps toward that "imprisonment."

> [Strait] is an Army Reserve officer not on active-duty. His active duty obligations were deferred .... on March 5, 1970, he was ordered to report for active duty ... beginning April 13, 1970. 406 U.S. at 341–342.

The cases above, then, all center on the restraint of imprisonment, and where the petitioner had not yet been imprisoned, the custodian

had taken all steps short of imprisonment. As the decision below recognizes, in this case:

> At this juncture, confinement is no more than a speculative possibility—'the unfolding of events may render the entire controversy academic.' (Appendix of Petition, p. 4a).

There is one further decision cited by petitioner with which respondent must contend if he is to show that petitioner has failed in his claim that the decision below is in conflict with applicable decisions of this Court. That is the recent case of *Maness vs. Meyers*, _____ U.S. _____, 42 L. Ed. 2d 574 (1975). Petitioner states that the decision below "is at odds with the attitude expressed by this Court" (Petition, p. 8) in *Maness*, and that *Maness* "implicitly recognized the propriety of the grant of the habeas corpus writ by the Texas federal court to Maley." (Petition, p. 9). Petitioner reads too much into this Court's opinion. It is true that the two attorneys in the Texas contempt proceedings were then subject only to a $500 fine.[10] But the case that was before this Court was Maness' and it had been brought up not through seeking a writ of habeas corpus in a federal district court, but directly on writ of certiorari under 28 U.S.C. § 1257(3) which reads:

> § 1257. State courts; appeal; certiorari
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . .

Petitioner in *Maness* was claiming a breach by Texas of the Fifth Amendment. This Court was not there faced with habeas corpus requirements, and all that it said in regards to habeas corpus was by way of giving the background of the case.

We do not know if the custody requirement of jurisdiction was argued in Maley's case in federal district court. We do not know whether the United States Court of Appeals for the Fifth Circuit

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[10] 42 L. Ed. 2d at 582.

would have reversed the district court's granting of the petition for a writ of habeas corpus on the point of "custody." We do know that the case was not before this Court and this Court did not hold that a $500 fine was a restraint that would cause a federal court to have jurisdiction to entertain an application for a writ of habeas corpus under 28 U.S.C. § 2254(a).

There being no conflict between the decision below and applicable decisions of this Court, certiorari should be denied.

**II. There Is No Conflict Between the Decision Below and the Decision of the Fourth and Second Circuits**

Contrary to Petitioner's statement, the decision below is not in conflict with decisions of the Fourth and Second Circuits and Petitioner cites no decision indicating that either of those circuits would have granted a writ of habeas corpus under the circumstances of Petitioner's case.

The case cited from the Fourth Circuit, *Walker vs. Dillard*, _____ F. 2d _____, No. 73-1108 (4th Cir., June 30, 1973) (set forth in Petition, pp. 26a–30a), is crucially different from the case below in that in *Walker* the petitioner had been sentenced to serve thirty days in jail. As the petition for certiorari in this case itself points out at p. 14, the Fourth Circuit's holding was grounded on its finding that:

> Under Virginia law the trial court clearly had the power to activate the thirty day sentence 'for any cause deemed by it sufficient.' *Va. Code Ann.* § 53-275; Barry vs. Commonwealth, 200 Va. 495, 106 S.E. 2d 593 (1959). It is inconceivable that there are any significant differences in 'restraints' on a man's liberty when he is released on bail, see *Hensley, supra,* than when he is released on a suspended sentence. In both situations a violation of any factor which the judge considers sufficient, subjects the defendant to incarceration.

In the case below, Petitioner had neither been released on bail nor on a suspended sentence. There was simply no sentence of incarceration to activate, for the only penalty levied had been a $25 fine. The language of the case cited from the Fourth Circuit clearly shows that that circuit would not have granted the writ of habeas corpus in the case below.

The three cases[11] cited from the Second Circuit all concern sentences phrased in the alternative, i.e. a fine, *or* imprisonment. But in *Horelick* and *Radich*, the petitioners had not paid the fine and were subject to imminent imprisonment while in *Thistlethwaite*, the language cited as authority is but dicta and in the context of that case is not in conflict with the decision below.

In *Horelick*, Petitioner had been ordered to surrender [366 F. Supp. at 1142].

> The first question presented by respondents, whether Horelick is 'in custody' although he has not yet surrendered to serve his jail term, has been answered adversely to their position by a decision of the Supreme Court handed down since the papers on the motion were submitted. *Id.*

Citing *Hensley, supra*, and stating this Court's holding therein, the district court found the two situations indistinguishable and stated in a footnote that:

> Respondents conceded prior to the *Hensley* decision that a ruling in that case would be applicable to the case at hand. *Id.*

Similarly, in *Radich* the petitioner had been released on bail. *Radich, supra* at 168.

In *Thistlethwaite*, the court's comment regarding habeas corpus can best be considered in the following context of that case:

> The judge below, in reaching his decision, concluded that since there is no doubt that state forums can be appropriate for the determination of issues arising under the Federal Constitution, if an issue is argued before a state tribunal, its resolution at that level carries with it all the usual effects of res judicata required by full faith and credit. Thus, while it is clearly a federal policy to allow to every plaintiff with a colorable claim his day in court, it is equally clearly not a court's duty to encourage career litigants by allowing federal duplication of state trials. Thus, the District Court concluded, where there has been a clear election by the plaintiff of the state forum, that court' decision may, under the concepts

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[11] *United States ex rel Horelick vs. Criminal Court*, 507 F. 2d 37 (2d Cir. 1974); *United States ex rel Radich vs. Criminal Court*, 385 F. Supp. 165 (S.D.N.Y. 1974); *Thistlethwaite vs. City of New York*, 497 F. 2d 339 (2d Cir.), cert. den. _____ U.S. _____, 43 L.W. 3359 (Dec. 23, 1974)

of res judicata, preclude a new consideration of the Constitutional claims by federal courts in a suit under the Civil Rights Act.

Appellants vigorously contest his conclusion. It is argued . . . Finally it is argued that there can be no election of forum in a criminal action, and that it is improper to require a defendant to stand mute in the dock to avoid 'electing' against his right to a federal forum. 497 F. 2d at 341.

In considering that argument the court said:

It is contended that a criminal defendant is given no choice as to the time and the place of his prosecution. The picture is presented to us of a prisoner in the dock standing mute for fear of losing his right to a federal adjudication of his constitutional claims. We are not convinced that an election of the state tribunal is required to hold the present action barred by collateral estoppel.

. . . . However, in connection with this argument there are two matters that should be raised in passing. First, . . . .

Second, it should be noted that habeas corpus is generally available in situations similar to the one at hand. Should the appellants show 'possible adverse collateral effects' of their conviction, they can gain a federal hearing by that route. [Citing *Carafas, supra*]. *Id.* at 342-343.

The comment regarding habeas corpus is clearly dicta, is much qualified by the words "generally" and "similar", and was merely "raised in passing." Clearly, the "possible adverse collateral effects" envisioned by the Second Circuit were not those minimal effects present in the case below and there is no conflict on the question between the Ninth and Second Circuits.

## III. This Court Should Not Interfere With The Procedure Of The State Court Unless there Is A Clear And Convincing Case Of A Violation Of A Constitutional Right Or Federal Statute

The case at hand is unlike the factual situation in the *Maness* case, *supra*, in which the paramount question involved was whether counsel in advising his client of his rights under the Fifth Amendment could by giving the wrong advice himself be subject to contempt if his client followed his advice. No such jeopardy to our judicial system appears in this case for the Respondent in this case was merely trying

to conduct an orderly and proper method of handling a case at trial before a jury. No problem of preventing an attorney from making an argument or statement on behalf of his client is involved for the problem was merely one of putting into the record the necessary preliminary information before permitting the Petitioner to address the court.

This matter was adequately and fairly handled by the highest court in the State of Hawaii in a manner which the Petitioner has not claimed to be erroneous for he did not request a Writ of Certiorari under 28 U.S.C. § 1257(3) after the decision on the Writ of Prohibition by the Supreme Court of the State of Hawaii. The Petitioner has had an adequate and complete review of the merits of his case by the State court and this Court, therefore, should not interfere with the procedures of the State court in the absence of presenting a clear and convincing showing of custody or violation of his constitutional right.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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# APPENDIX
# HAWAII PENAL CODE

Sec. 1077--Criminal Contempt of Court.

(1) A person commits the offense of criminal contempt of court if:

(a) He recklessly engages in disorderly or contemptuous behavior, committed during the sitting of a court in its immediate view and presence, and directly tending to interrupt its proceedings or impair the respect due to its authority; or

(b) He creates a breach of peace or a disturbance with intent to interrupt a court's proceedings; or

(c) As an attorney, clerk or other officer of the court, he knowingly fails to perform or violates a duty of his office, or knowingly disobeys a lawful directive or order of a court; or

(d) He knowingly publishes a false report of a court's proceedings; or

(e) Knowing that he is not authorized to practice law, he represents himself to be an attorney and acts as such in a court proceeding; or

(f) He intentionally records or attempts to record the deliberation of a jury; or

(g) He intentionally disobeys or resists the process, injunction, or other mandate of a court; or

(h) He intentionally refuses to be qualified as a witness in any court or, after being qualified, to answer any proper interrogatory without a privilege to refuse to answer; or

(i) Being a juror, he intentionally, without permission of the court, fails to attend a trial or official proceeding to which he has been summoned or at which he has been chosen to serve.

(2) Except as provided in subsection (3), criminal contempt of court is a misdemeanor.

(3) The court may treat the commission of an offense under subsection (1) as a petty misdemeanor, in which case:

(a) If the offense was committed in the immediate view and

presence of the court, or under such circumstances that the court has knowledge of all of the facts constituting the offense, the court may order summary conviction and disposition; and

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(5) Whenever any person is convicted of criminal contempt of court or sentenced therefor, the particular circumstances of the offense shall be fully set forth in the judgment and in the order or warrant of commitment. In any proceeding for review of the judgment, sentence or commitment, no presumption of law shall be made in support of the jurisdiction to render the judgment, pronounce the sentence, or order the commitment. A conviction under subsection (3)(a) shall not be subject to review by direct appeal.

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## CERTIFICATE OF SERVICE

I hereby certify that three copies of this Brief in Opposition were served upon the following person by mailing the same to him, postage prepaid, this date:

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